Supreme Court, U.S.
FILED
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(7)

No. 06-360

IN THE

Supreme Court of the United States

ANTHONY G. VASEK,

Petitioner,

v.

MT. SAN JACINTO COLLEGE DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT,
DIVISION TWO

BRIEF IN OPPOSITION FOR RESPONDENT ROY B. MASON

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the California Court of Appeal's Unpublished Opinion affirming the trial court's dismissal of Petitioner's case following Petitioner's express "Waiver of Leave to Amend (and Plaintiff's Continued Reliance Upon, And Affirmation Of, His Eighth Amended Complaint)" does not implicate any federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the California Court of Appeal's Unpublished Opinion affirming the trial court's dismissal of Petitioner's case following Petitioner's express "Waiver of Leave to Amend (and Plaintiff's Continued Reliance Upon, And Affirmation Of, His Eighth Amended Complaint)" does not conflict with relevant decisions of this Court and does not implicate an important federal question that has not been settled by this Court.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the asserted error in the California Court of Appeal's Unpublished Opinion affirming the trial court's dismissal of Petitioner's case largely consists of allegedly erroneous factual findings and/or the misapplication of a properly stated rule of law.

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INTRODUCTION

Petitioner has presented no compelling reasons for granting his Petition for a Writ of *Certiorari* ("Petition"). Petitioner fails to demonstrate that the California Court of Appeal's March 10, 2006 Opinion (hereinafter the "appellate opinion") is in conflict with a decision of this Court or decided an important federal question that has not been settled by this Court. (See Sup. Ct. R. 10(a)-(c).) Petitioner makes unconvincing arguments as to a conflict between the subject Unpublished California Court of Appeal Opinion and the Ninth Circuit decision in *Doe v. Lawrence Livermore National Laboratory* (9th Cir. 1995), 65 F.3d 771, while completely ignoring the fact that his case was dismissed because he *expressly* waived his right to file a ninth amended complaint after his eighth amended complaint exceeded the scope of amendment previously permitted by the court. Thus, the Petition should be denied.

Petitioner also contends that the California Court of Appeal misapplied the state immunity clause of the Eleventh Amendment to the U.S. Constitution. (See Petition, p. 17, II.) Such claim is not the proper subject of Supreme Court review (See Sup. Ct. R. 10), and has no application to Respondent Mason because Mason challenged Petitioner's eighth amended complaint on the grounds that it exceeded the scope of amendment permitted by the trial court and Petitioner, though invited to do so by the court, did not seek leave of court to file an amended complaint asserting new claims or causes of action against Respondent Mason (and others). Procedural errors by Petitioner, which he expressly waived the opportunity to correct, led to the dismissal of his case.

STATEMENT OF THE CASE

This case has a long history. Petitioner filed his original complaint over 12 years ago, on August 26, 1994. Petitioner was employed as a faculty member of the San Jacinto Community College. He claimed he was the victim of a conspiracy designed to retaliate against him for criticizing the school's vocational drafting program and speaking out about his alleged mistreatment. (Respondent's Appendix (hereinafter "Res.App.") 5a.)

Over the past twelve years, Petitioner has represented himself before the trial court, the California court of appeal, the California Supreme Court and this Court.[1] A previous appeal resulted in a decision filed on October 4, 2001, with a remittitur issuing on January 23, 2002. (Res.App. 6a.) When Petitioner did not file an amended complaint within the statutorily permitted time, on June 20, 2002, Respondent Mason filed a demurrer to the third amended complaint, the most recent version of the complaint naming Mason. The hearing on the demurrer was set for hearing on July 25, 2002. However, the demurrer was rendered moot on that date as Petitioner had filed an eighth amended complaint on July 17, 2002.

1. Petitioner is Granted Limited Leave to Amend.

The facts and circumstances surrounding the filing of Petitioner's eighth amended complaint were important to the appeal. Petitioner's eighth amended complaint was filed in response to the court's granting of a motion for judgment on the pleadings filed by Respondents Grosz and Hartley.

1. Petitioner's previous Petition for Writ of Certiorari was denied on June 3, 2002.

(Res.App. 6a.) The court's instructions to Petitioner at the June 17, 2002 hearing on Grosz and Hartley's motion for judgment on the pleadings, and the order entered following the hearing, were not fully discussed in the Petition. Thus, the details of the *limited leave to amend* granted by the court are highlighted here for the Court's ease of reference.

When questioned by the court, Petitioner indicated he was seeking leave to amend with respect to the motion for judgment on the pleadings. He indicated he wanted to amend the complaint "to bring in quite a number of issues" and "actions that have occurred since the last amended complaint." (RT p. 26:lines 25-28.)[2] The court reiterated several times that the motion before it was brought by only two defendants, Grosz and Hartley (RT p. 30:lines 4-7, p. 32:line 25 – p. 33:line 7), and that *the leave to amend being granted was limited to those two defendants*. (See, Res.App. 6a.) Petitioner assured the court several times that he understood this limitation, and the court explained that if Petitioner sought leave beyond that ordered, he was required to file a motion so requesting:

> THE COURT: . . . [¶] Now, with respect to that motion for judgment on the pleadings by Grosz and Hartley, Mr. Vasek, you may respond, remembering that what I have discussed and what *I am indicating to you is the likelihood that I may give you leave to amend with respect to Grosz and Hartley so as to overcome the deficiencies pointed out by the motion and nothing else*. You understand that, sir?

2. Reporter's Transcript (hereinafter "RT") refers to the Reporter's Transcript from the trial court proceedings, which is part of the record in the Court of Appeal.

MR. VASEK: *I understand that, your Honor.* Yes. (RT p. 33:21-28, itals. added.) . . . . .

THE COURT: Okay. *But if you intend to amend as far as other defendants, you have to file a motion for leave to amend,* and you have to set forth in that motion the basis for that amendment . . . *You can't backdoor it* by putting it in as a response for motion for judgment on the pleadings. *So that's not proper, and I will not permit it.* And if you intend to file leave to amend, file your leave to amend. I am not stopping you from doing that. I am telling you that I'm dealing today with two motions: One, a motion to compel on which we have already ruled. Second, a motion for judgment on the pleadings. I'm tempted to give you 30 days to amend with respect to the allegations against Karen Sue Grosz and Phil Hartley, to attempt to state the cause of action against those two people. *I'm not granting you leave to amend as to any other portions of these proceedings. Do you understand that, sir? If you wish to have leave to amend as to other portions of these proceedings, you must file a request to do that.*

MR. VASEK: Well, then I would ask the Court for 60 days for leave to amend with regards to Grosz and Hartley so that I can file a motion prior to amending my complaint for leave to amend the complaint as to all defendants, to include all actions, including actions that were not covered by the opinion of the Court of Appeal. Because many actions took place after the appeals were

taken from the Superior Court that are relevant, very relevant to this case, but occurred after all the defendants were dismissed and the Court of Appeal rendered its opinion. . . .

THE COURT: Let me just put it this way. I'm going to give you 30 days. If you want to file a request for additional time for leave to amend and indicate all the things you want to amend, have at it. But it's not before me properly now. You now have a response to a motion for judgment on the pleadings, and I'm dealing with that only. And I'm going to deal with things in this case, whatever's brought forth, one thing at a time. I'm not going to deal with a broad sweeping request to amend or to do anything else made simply orally or in response to some other motion. You're going to have to make your motion clear so that everybody understands what it is. (RT p. 34:lines 5 – p. 35:line 17, itals. added.)

THE COURT: . . . I'm going to grant your request for a continuance for 30 days to file an amendment to the complaint pertaining to Karen Sue Gross (sic) and Phil Hartley. In the meantime, you file a further motion on my — of things that you have outlined. That's fine. We'll consider it, ... (RT p. 36:line 27 – p. 37:line 3, itals. added.)

The court's July 2, 2002 order entered on Grosz and Hartley's motion for judgment on the pleadings is entirely consistent with the sentiments expressed at the June 17,

2002 hearing. (See Clerk's Transcript ("CT")[3] 294-297 ["Defendants' Grosz and Hartley's motion for judgment on the pleadings is granted. Plaintiff Vasek is granted 30 (thirty) days leave to amend. The plaintiff may either file amendments or may file an amended complaint. Any new allegations by the plaintiff are to be limited solely to addressing the pleading defect placed at issue by Grosz and Hartley's motion for judgment on the pleadings"].)

2. Petitioner's Eighth Amended Complaint Exceeds the Scope of Amendment Permitted by the court.

Despite the court's explicit instructions concerning the limited nature of the leave to amend, Petitioner did exactly what he was ordered not to do — he attempted to "backdoor" new allegations into the eighth amended complaint, which had nothing whatsoever to do with the issues raised by Grosz and Hartley. (Res.App. 6a; CT 54-87; 367-407.) The amended pleading added allegations against numerous defendants, including Respondent Mason, and included an entirely new second cause of action for "malicious prosecution of administrative proceedings," in which he did not even name Grosz and Hartley. (Res.App. 6a; CT 367-407.)

When the parties were back in court on July 25, 2002, in connection with Respondent Mason's demurrer and motion to strike Petitioner's third amended complaint (which the court rendered "moot" in light of the eighth amended complaint), the court recommend that the parties get together to discuss any potential violation by Petitioner of the court's

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3. Clerk's Transcript (hereinafter "CT") refers to the Clerk's transcript of the documents contained in the Superior Court file, which is part of the record on appeal.

order limiting the scope of amendment allowed, and that Petitioner bring the eighth amended complaint into compliance. (Supplemental Clerk's Transcript ("SCT") 503:lines 23-28.)[4] Respondent Mason wrote to Petitioner explaining that the eighth amended complaint was not in compliance with the court's order (SCT 399, 410, 508-510, 514), but Petitioner maintained that the court's order "never had any basis in law." (SCT 513.)

Unable to convince Petitioner of his need to seek leave of court before filing an amended complaint which exceeded the court's order, Respondent Mason filed a demurrer challenging the merits of the claims asserted against him, and a motion to strike all of the claims against him in light of the court's July 2, 2002 order limiting the scope of amendment available without further leave of court. (Res.App. 6a; CT 503-507, 508-510, 1556- 1563, 1564-1569, 2000-2006; SCT 396-600, 601-881.) Petitioner opposed the motion (CT 1862-1878, 1879-1912), and on November 27, 2002, the court granted Respondent Mason's motion to strike. (Res.App. 7a; RT p. 82:line 6 – p. 83:line 24, p. 108:lines 17-23.) After sustaining the demurrers filed by other defendants, the court granted Petitioner 30 days leave to amend. (RT p. 85:line 27 – p. 86:line 10, p. 107:line 24 – p. 108:line 3; see also, Res.App. 7a.)

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4. Supplemental Clerk's Transcript (hereinafter "SCT") refers to portions of the Clerk's Transcript of the documents contained in the Superior Court file, which is part of the record on appeal.

3. After Petitioner Expressly Waives Leave to Amend, the Case is Dismissed.

On December 10, 2002, Petitioner served a "Notice of Plaintiff's Waiver of Leave to Amend (and Plaintiff's Continued Reliance Upon, And Affirmation Of, His Eighth Amended Complaint"). (SCT 1013-1015.) On February 7, 2003, Respondent Mason filed a motion to dismiss on the basis that Petitioner had failed to amend the complaint within the time permitted by law and had expressly declared his intention not to amend his complaint. (CT 2050-2051; SCT 1002-1019.) Petitioner filed no opposition to the motion (CT 2114-2115), and on March 5, 2003, the court granted the motion to dismiss. (Res.App. 7a; CT 2113-2115.)

On March 10, 2006, the court of appeal issued a *unanimous unpublished opinion*, affirming the judgment against Petitioner. (Res.App. 1a-17a.) Petitioner filed a petition for review with the California Supreme Court, which was denied. (Petitioner's Appendix "Pet.App." 32.) This Petition followed.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeal, nor do they implicate a federal question that has not been decided by this Court. Petitioner's case was dismissed because he *repeatedly* violated the California Code of Civil Procedure, California Rules of Court, orders issued by the trial court, and ultimately "defeated his own claims through procedural error." (Res.App. 4a.) Thus, Petitioner has not carried his burden of establishing any compelling reasons the Court should grant the Petition.

I. The Court of Appeal Properly Reviewed the Trial Court Decisions and Correctly Found no Abuse of Discretion.

Petitioner challenged the court's ruling on Respondent Mason's motion to strike the eighth amended complaint pursuant to Code of Civil Procedure section 435 *et seq.*, which was subject to the abuse of discretion standard. (*CLD Const., Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.) The court's ruling on a motion to dismiss brought pursuant to Code of Civil Procedure section 581(f) was also reviewable for an abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) The trial court's ruling granting Petitioner 30 days leave to amend (after granting Respondent Mason's motion to strike and sustaining the demurrers filed by other defendants) was likewise subject to the abuse of discretion standard. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) When leave to amend is permitted and no amendment is attempted, it is presumed on appeal that the complaint states as strong a case as is possible and judgment should be

affirmed on appeal if the unamended complaint (Petitioner's eighth amended complaint) is objectionable on any ground raised on demurrer. (See *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585; *Orworth v. Southern Pac. Transp. Co.* (1985) 166 Cal.App.3d 452, 457.)

Pursuant to the abuse of discretion standard, the trial court ruling is not to be disturbed absent a showing of "a clear case of abuse" and "a miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court (Marsh & Kidder)* (1970) 2 Cal.3d 557, 566.) Discretion is abused only when the trial court decision "exceeds all bounds of reason." (*Denham*, 2 Cal.3d at 566, quoting *Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349.) With regard to Respondent Mason, Petitioner did not and could not dispute that he had not been given leave to file the eighth amended complaint asserting new claims or a new cause of action as against Mason. Thus, Petitioner failed to meet his burden of showing that the court abused its discretion by striking the new allegations. (*Blank*, at 331; *Denham*, at 566.)

II. By Failing to Provide the Court of Appeal with Reasoned Legal Argument and Citation to Appropriate Legal Authority, Petitioner Waived the Arguments He Raised On Appeal.

Petitioner had the burden to present the Court of Appeal with argument and legal authority in support of each point raised. That obligation required more than simply stating bare assertions that the judgment, or any part of it, was erroneous, leaving the Court of Appeal to speculate as to the basis for this argument. It is well established California law that when an appellant asserts a point in his opening brief but fails to

support it with reasoned argument and citation to applicable legal authority, the point is properly treated as waived and passed on without further consideration. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611; *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Kim v. Sumitomo Bank of Calif.* (1993) 17 Cal.App.4th 974, 979 [Conclusory arguments based on counsel's opinion, without citation to recognized legal authority, disregarded on appeal]; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466.)

Many of the "issues" raised in Petitioner's appellate brief did not contain reasoned legal argument and did not cite a single case in support of Petitioner's argument and further hampered his case on appeal. (See, Res.App. 4a-5a; Pet.App.139-161; see Cal. Rules of Court, Rule 14(a)(1)(B); *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 ["We need not consider an argument for which no authority is furnished"]; *People ex el. 20th Century Ins. Co. v. Builders Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284.)

III. Respondent Mason's Motion to Strike Was Properly Granted.

The one issue that arguably involved Respondent Mason was entirely irrelevant as it addressed only Respondent Mason's demurrer to the eighth amended complaint. However, Mason's demurrer was deemed "moot" after the court granted Respondent Mason's motion to strike. (RT p. 82:line 6 – p. 83:line 24, p. 108:lines 17-23.) In fact, Petitioner did not present an argument supported by legal authority addressing the propriety of the order granting the motion to strike. Because Petitioner did not and could not articulate a viable legal argument as to any appealable ruling

as to Respondent Mason, his appeal properly failed. (*Leader v. Health Industries of America, Inc.*, (2001) 89 Cal.App.4th 603, 611, citing *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711 [". . . plaintiffs have presented no argument or authority in support of any contention that the trial court erred in sustaining the demurrers. This aspect of plaintiffs' appeal has been abandoned"].) There is a long line of California cases holding that the Court may treat an entire appeal as abandoned, thus warranting its dismissal, if appellant's opening brief fails to articulate any pertinent or intelligent legal argument. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119; *In re Sade Co.* (1996) 13 Cal.4th 952, 994.)

Moreover, Petitioner did not and could not meet his additional burden of showing the errors alleged were prejudicial. (Cal. Const., Art. VI, section 13; Code Civ. Proc. section 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 ["Where any error is relied on for a reversal is not sufficient for appellant to point to the error and rest there"].) The trial court specifically advised Petitioner that the court was "not stopping" him from filing for leave to amend beyond the limitation imposed in the order. (RT p. 34:lines 12-13.)

In fact, Petitioner indicated he would "file a motion prior to amending [his] complaint for leave to amend the complaint as to all defendants, to include all actions, including actions that were not covered by the opinion of the Court of Appeal." (RT p. 34:lines 25 – p. 35:line 6.) For reasons unknown to Respondent Mason, Petitioner never attempted to seek leave of court to add new allegations against defendants other than Grosz and Hartley. His failure to do so was *fatal* to his appeal.

Respondent Mason was dismissed from the case following the granting of his motion to strike all portions of the eighth amended complaint referring to him. The motion to strike was very straightforward: The court specifically granted Petitioner leave to file an amended complaint only as to Grosz and Hartley; Petitioner's eighth amended complaint far exceeded the limited leave granted by the court and violated the law; Petitioner had an open invitation to move for leave beyond this limitation, but he failed to seek leave to amend as to other defendants or other issues. (See, Res.App. 6a; Cal. Code Civ. Proc. § 435.)

Because the eighth amended complaint exceeded the scope of Petitioner's previous claims against Respondent Mason, Mason's motion to dismiss was properly granted. (See, Res.App. 15a; Code Civ. Proc. § 581(f).)

CONCLUSION

Petitioner has not demonstrated any compelling reasons for this Court to grant the Petition. Therefore, Respondent Mason respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO FILED MARCH 10, 2006

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION 2

E033583 / E035087

(Super.Ct.No. 254638)

ANTHONY G. VASEK,

Plaintiff and Appellant,

v.

MT. SAN JACINTO COLLEGE DISTRICT et al.,

Defendants and Respondents.

OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes and Charles D. Field, Judges. Affirmed.

Anthony G. Vasek, in pro. per., for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Jacob A. Appelsmith, Senior Assistant Attorney General, Silvia M. Diaz, Lead

Supervising Deputy Attorney General, and Dana T. Carbozian, Deputy Attorney General, for Defendants and Respondents Karen Sue Grosz and Phil Hartley.

Atkinson, Andelson, Loya, Ruud & Romo, Sherry G. Gordon and John W. Dietrich for Defendants and Respondents Atkinson, Andelson, Loya, Ruud & Romo, Ronald C. Ruud, Sherry G. Gordon and Steven Atkinson.

Briskin, Latzanich & Pene and Katherine B. Pene for Defendant and Respondent Keenan & Associates.

Shea Stokes & Carter, Maria C. Roberts and Shirley A. Gauvin for Defendant and Respondent Roy B. Mason.

Law Offices of Dennis J. Walsh, Dennis J. Walsh and George E. Ordonez for Defendants and Respondents Mt. San Jacinto Community College District et al.

Gilbert, Kelly, Crowley & Jennett, Barbara J. Mandell and Lyndon H. Hong for Defendant and Respondent Royce Lapp.

Appendix

1. *Introduction*[1]

Anthony Vasek appeals from a judgment of dismissal entered after he declined to amend his eighth amended complaint and from a summary judgment entered in favor of defendant Royce Lapp. Vasek, a tenured instructor at Mt. San Jacinto Community College, seeks recovery for an alleged conspiracy against him beginning in April 1989 and continuing until 2004 and beyond. This case is now in its twelfth year of litigation.

Defendants and respondents are the Mt. San Jacinto College District and 26 individual defendants[2] (College District and District Defendants); the law firm of Atkinson, Andelson, Loya, Ruud & Romo, and its individual members, Ronald Ruud and Sherry Gordon (the Attorneys); Keenan &

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1. Vasek filed a request for judicial notice on December 20, 2004. Item A, located at pages one through 16 and 45 through 63 of the appendix to Vasek's request, and Item E appear to have been part of the trial court record below. We deem these documents part of the appellate record by augmentation. (Cal. Rules of Court, rule 12, subd.(a).) We deny the request for judicial notice of Item B, the bankruptcy pleadings, pages 17 through 44 of the appendix. (Evid.Code, § 452, subd. (d).) Item C is already part of the appellate record. Item D is this court's own records.

2. Bobby Avila, Lawrence Barkley, David Bookin, Claire Broyles, Bernard J. Carrigan, William Farrell, Elgin Hushbeck, Eugene Kadow, Marcia Krull, Richard Lowe, Anne Motte, John Motte, Steve Narin, Kazi Nizamuddin, Shahla Razavi, Kelly Roberts, Robert G. Rockwell, Gwendolyn Schlange, Robert Schley, John Seed, Richard Sisk, Karl Sparks, Wayne Stuart, Michael Tuasig, Wally Upper, and M. Anne Walker.

Associates; and four other individuals, Karen Sue Grosz, Phil Hartley, Roy B. Mason, and Lapp.[3]

In a previous opinion (E017343), this court addressed the viability of Vasek's claims. We reversed the trial court's order sustaining the demurrer of the District Defendants (including Mason), acting in their personal capacities; the trial court's order sustaining Attorneys' demurrer; the trial court's order sustaining Keenan's demurrer; the trial court's order granting summary judgment as to individual defendants, Grosz and Hartley; and the trial court's order granting Lapp's motion to strike under Code of Civil Procedure section 425.16.

Here Vasek has defeated his own claims through procedural error. By failing to amend his complaint after issuance of the remittitur from the previous appeal, by filing an amended complaint without leave of court except as to Grosz and Hartley, and by refusing to amend his ultimate pleading after being granted leave to amend, Vasek has finally reached a procedural terminus.

Vasek raises a multitude of issues that we will consider in turn according to the affected party. Our review is hampered by Vasek, acting in propria persona, failing to follow the rules and conventions of appellate procedure: "This court is not inclined to act as counsel for . . . any appellant and furnish a legal argument as to how the trial

3. In our previous opinion, Mason and Lapp were included among the 28 District Defendants, although Lapp had separate representation. In the present appeal, Mason and Lapp appear separately as respondents from the other 26 District Defendants.

court's rulings . . . constituted an abuse of discretion." (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164; *Dills v. Redwoods Assocs. Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) We further deplore the rhetoric Vasek employs, relying upon ad hominem attacks and other unseemly rhetorical devices, rather than accurate citation to the record and reasoned legal argument.

2. *Factual and Procedural Background*

We have discussed the basic facts of this action in the earlier appellate opinion, which we incorporate by reference. Briefly, the College District employed Vasek as an engineering and mathematics instructor in 1987. After some years of conflict between Vasek and the College District about curriculum and Vasek's qualifications, in August 1993, the College District assigned Vasek to teach remedial mathematics. The chief areas of conflict involved whether the vocational drafting program was a transfer program for engineering and whether Vasek was qualified to teach vocational drafting. In August 1994, Vasek filed the original complaint. After various proceedings, Vasek filed his seventh amended complaint in August 1996. After a final disposition, the trial court dismissed the case. Vasek appealed in March 1997.

In the meantime, a notice to correct deficiencies was issued to Vasek in November 1995 (Ed.Code, §§ 87732 and 87734) and a notice of intent to dismiss Vasek was issued in June 1996. An administrative hearing was conducted in 1997 and, in August 1997, the administrative law judge decided

in favor of Vasek and dismissed the statement of charges and accusation against him.

After the previous appeal was decided in October 2001, the case was remanded to the trial court for further proceedings. Vasek did not file an amended complaint within 30 days, as required by Code of Civil Procedure section 472, subdivision (b), after issuance of the remittitur on January 23, 2002.

In June 2002, the court granted a motion for judgment on the pleadings brought by Grosz and Hartley but granted Vasek leave to file an eighth amended complaint (EAC), "limited solely to addressing the pleading defect placed at issue by Grosz and Hartley's Motion for Judgment on the Pleadings."

Instead, when Vasek filed the EAC in July 2002, he presented new allegations against defendants, including that he had prevailed in the 1997 administrative hearing. The EAC contains two causes of action: one for violation of civil rights (42 U.S.C. § 1983); and a new cause of action for malicious prosecution of administrative proceedings, asserted against 10 District Defendants-Broyles, Kadow, Mason, Motte, Roberts, Rockwell, Rohrabacher, Schlange, Stuart, and Upper-and against the Attorneys. The EAC alleges that August 26, 1993, the date Vasek was demoted, was the date of his injury.

The College District and the District Defendants, the Attorneys, Keenan, Grosz and Hartley, and Mason filed motions to strike and demurrers to the EAC.

Appendix

In November 2002, the court ordered the demurrers sustained and motions to strike granted with leave to amend. Subsequently, Vasek filed a waiver of leave to amend in which he declined to file a ninth amended complaint.

After the latter defendants filed separate motions to dismiss, the court dismissed the action as to them. Vasek appealed in April 2003.

In December 2003, the trial court granted Lapp's motion for summary judgment. Vasek appealed in January 2004.

3. *The "Disenfranchised" Defendants*

As a preliminary matter, we address Vasek's persistent claim that some individual defendants, whom Vasek does not identify by name, were incorrectly omitted or dismissed by the trial court from the case. Vasek has not presented a coherent explanation of who are the missing parties, when they were dismissed or omitted from the case, and why this was wrong.

His reliance on this court's order of July 25, 2002 is misplaced. In that order, we explained that, based on our previous opinion, Vasek could proceed against the individual District Defendants acting in their individual capacities if he amended his complaint. Our previous opinion affected 28 District Defendants, including Lapp who was represented separately. (EO17343, p. 3.) The present appeal involves the same 28 District Defendants, including Lapp and Mason, both now represented separately. The appellate order of July 25, 2002, did not identify or establish there are additional missing

defendants who should be included in the lawsuit. Meanwhile, Vasek acknowledges that all the named defendants are proper respondents. Vasek has offered no legal authority to support his contention that he could not proceed with his lawsuit against the 35 named defendants, who are respondents in this appeal, absent other "disenfranchised" defendants. Therefore, we deem this issue lacking merit, unsupported, and waived on appeal. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

Our resolution of this issue also dispenses with Vasek's argument the trial court should have granted his motions to strike defendants' pleadings and to vacate court orders based on his contention there were other necessary defendants.

4. *Grosz and Hartley*

Vasek sued Grosz in her capacity as a member of the Board of Governors for California Community Colleges. Vasek sued Hartley in his capacity as President of the Academic Senate for California Community Colleges. Vasek's specific allegations against Grosz and Hartley are that, in March 1990, they helped cancel an independent investigation by the Academic Senate of Vasek's grievances. But Vasek also alleges they had left their positions before September 1992. Vasek's injury was sustained in August 1993. The other acts Vasek specifies in his appellant's brief all occurred after August 1993.

Grosz and Hartley filed a demurrer to the EAC on the grounds that the section 1983 claim, the cause of action

directed against them, is time-barred because their only alleged involvement began in March 1990 and ended before September 1992, the beginning of the 1992-1993 academic year. So, a section 1983 claim filed in August 1994 based on an injury sustained in August 1993 was not timely under the then-applicable one-year statute of limitations. (*Knox v. Davis* (9th Cir.2001) 260 F.3d 1009, 1012-1013; *Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028-1030; Code Civ. Proc., §§ 340, subd. (3), and 335.1) We agree that, even if Grosz and Hartley's alleged conduct had continued from March 1990 until September 1992, there are no allegations supporting a timely section 1983 claim in the EAC against these two people based on a complaint filed in August 1994 for an injury sustained in August 1993 but continuing until 1997 and after.

Vasek argues that our previous opinion permitted him to amend his complaint to allege a continuing course of conduct, including an administrative disciplinary proceeding beginning in November 1995 and ending in August 1997. But it is a complete misinterpretation for Vasek to assert we "left the door wide open for Vasek to allege any and all wrongful conduct . . . including factual allegations that occurred after filing the first set of appeals" in March 1997. We offered no such *carte blanche* to Vasek.

Instead, our former opinion suggested Vasek might have been able to amend his section 1983 claim to include allegations of equal protection violations. (E017343, p. 21) We also determined that he had successfully alleged the elements of a section 1983 claim against some defendants. (E017343, pp. 23-24.) But we concluded the College District

and the District Defendants, acting in their official capacity were immune from section 1983 liability, citing *Kirchmann v. Lake Elsinore Unified School District* (2000) 83 Cal .App.4th 1098. (E017343, pp. 24-27.) As to Keenan, even though we overruled the order sustaining the demurrer, we opined amendment was still necessary to state a valid claim. (E017343, p. 53.)

In our last opinion, we noted it was possible to allege a continuing conspiracy. The facts would need to demonstrate the existence of a conspiracy; i.e. that coconspirators have knowledge of and intent to accomplish a planned objective. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.) But Vasek had to allege facts, not conclusions, showing a "'series of related acts, one or more of which falls within the limitations period.'" (E017343, p. 43, citing *Green v. Los Angeles County Superintendent* (1989) 883 F.2d 1472, 1480, overruled in *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 114; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 816.)[4] And, once an injury has occurred, "[m]ere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations. [Citations.] To establish a continuing violation, continued unlawful acts must be demonstrated." (*Compton v. Ide* (9th. Cir.1984) 732 F.2d 1429, 1432-1433.)

Applying the foregoing principles to Grosz and Hartley, we conclude Vasek should have amended his complaint after issuance of the remittitur on appeal. When he finally did

4. We recognize that the "related-acts" test in *Green* was overruled by *Morgan*. But we discuss it because Vasek relies upon it and it may have some continuing viability as to general principles.

amend after receiving leave, he went both too far and not far enough. He added new conclusory allegations but he did not supply the factual predicate necessary to make Grosz and Hartley liable for a continuing conspiracy and certainly not liable for every adverse employment event that affected Vasek after September 1992 when these two people departed the scene.

When a case involves an order sustaining a demurrer with leave to amend and "'[w]hen a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]' [Citation.]" (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.) Because Vasek declined to amend his complaint to make the necessary allegations, the trial court did not abuse its discretion when it dismissed the action as to Grosz and Hartley. (Code Civ. Proc., § 581, subds. (f)(2); *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

The trial court also properly granted Grosz and Hartley's motion to tax Vasek's costs on appeal because the cost memorandum was belatedly filed on August 2, 2002.[5] In order to be timely, the cost memorandum should have been filed by March 4, 2002, which was 40 days after the clerk of the court issued its remittitur on January 23, 2002. (Cal. Rules of Court, rules 26(d), and 870(a)(1); *Hydratec, Inc. v. Sun*

5. Motions to tax costs were also filed by Mason, the College District, the Attorneys, and Keenan. The same analysis applies regarding them and Lapp.

Valley 260 Orchard & Vineyard Co. (1990) 223 Cal.App.3d 924, 929.)[6]

5. *The Attorneys*

The Attorneys were sued because they represented the College District in employment matters and gave advice regarding Vasek's employment. The Attorneys were named as defendants in the third amended complaint, the subject of Vasek's previous appeal, and in the EAC, filed after the trial court granted Grosz and Hartley's motion for judgment on the pleadings with leave to amend. At this juncture, the only issue is whether the trial court properly dismissed the EAC with prejudice after Vasek declined to amend.

For several reasons, we uphold the trial court's dismissal of the EAC. First, dismissal was not an abuse of discretion when Vasek declined to amend after the trial court sustained the Attorneys' demurrer and granted the motion to strike with leave to amend. (Code Civ. Proc., §§ 581, subds. (f)(2) and (4); *Leader v. Health Industries of America, Inc., supra,* 89 Cal.App.4th at p. 612.) The dismissal was also proper because both the demurrer and the motion to strike directed at the EAC were well taken. Vasek had not been given leave to file the EAC asserting more allegations and a new cause of action against the Attorneys. The EAC significantly exceeded in scope the trial court's grant of leave to amend Vasek's claims against Grosz and Hartley. Whatever merit may have existed in his previous versions of the complaint,

6. The District and District defendants withdraw their objection to the appealability of this issue in a letter filed July 21, 2005, with this court.

because Vasek refused to cure the defects in his EAC, the court properly dismissed the action as to the Attorneys. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

6. *Keenan*

Keenan & Associates was the insurance broker and claims adjuster for the College District. Keenan sent notices to Vasek rejecting his claims against the District on March 10 and August 16, 1994. Vasek alleges that Keenan convinced "District officials to not grant Vasek's request for an inquiry into the reasons for his banishment and the cancellation of the planned investigation."

Keenan occupies the same procedural posture as the Attorneys in that Vasek had not been given leave by the trial court to file the EAC asserting new claims against Keenan. For that reason and because the EAC exceeds the scope of Vasek's previous claims against Keenan, the court properly dismissed the action as to Keenan. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

7. *The District*

In the previous appeal, based on *Kirchmann v. Lake Elsinore Unified School District, supra,* 83 Cal.App.4th 1098, we affirmed the judgment dismissing the College District itself and the District Defendants, when acting in their official capacity, (E017343, pp. 26 and 71) but proposed "[i]f . . . plaintiff is alleging the retaliatory deprivation of certain rights and privileges, *his complaint can be amended* to incorporate such allegations in his section 1983 claim.

[Emphasis added.]" (E017343, pp. 21-22.) Therefore, Vasek's claims against the College District or any of the District Defendants, acting officially, were terminated by the last appeal. All that remained was the potential to assert a claim against the District Defendants acting in their personal, rather than official, capacities.

As noted, however, Vasek did not file an amended complaint after the remittitur issued (Code Civ. Proc., § 472, subd. (b)). He also did not seek leave to file an amended complaint against the District Defendants. Nevertheless, in his unauthorized version of the EAC, he again named the College District itself as a defendant and added many new allegations and the new cause of action. Again, as discussed above, Vasek's failure to amend his complaint after the remittitur issued and his subsequent failure to seek leave to amend amply justified the trial court dismissing his case after he refused to file another amended complaint.

We also reject Vasek's urging us to revisit the applicability of *Kirchmann* and its holding that a school district is an instrumentality of the state, exempt from suit under section 1983. There is no cognizable reason to abandon our previous decision on this issue. (E017343, pp. 24-27.)

8. *Mason*

Mason was a College District employee. Vasek alleges that, after he filed his original complaint in 1994, Mason conspired with others to retaliate against Vasek in multiple ways, including by pursuing malicious prosecution of the administrative proceeding against him.

Again, Vasek had not been given leave to file the EAC asserting new claims or a new cause of action against Mason. For that reason and because the EAC exceeds the scope of Vasek's previous claims against Mason, the court properly dismissed the action as to Mason. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

9. *Lapp*

Lapp based his motion for summary judgment on the one-year statute of limitations for a section 1983 claim. According to his supporting evidence, Lapp's one contact with Vasek occurred at a curriculum meeting on April 3, 1989. Lapp was a private consultant who supervised the meeting. After Vasek disrupted the meeting, Lapp wrote a report describing Vasek's conduct and in which he recommended eliminating the subject of drafting from the curriculum project. Lapp had no other contact with Vasek and no contact with the College District after June 1989. Lapp argues that, as a matter of law, this single incident cannot support Vasek's conspiracy claims first advanced against Lapp more than five years later in August 1994.

In opposition, Vasek did not offer any contrary evidence or any evidence demonstrating a continuing conspiracy between Lapp and the other defendants. Instead, he contends evidence of a conspiracy involving Lapp may be inferred from other facts or will be presented at trial.

Applying a de novo standard of review, we affirm the grant of summary judgment in favor of Lapp. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138,

1142.) Inferences cannot be made in a factual void. It is not enough, as Vasek does, to hint at evidence that is promised but never delivered. In opposing summary judgment, a party must supply "'specific facts showing that there is a genuine issue for trial.'" (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1286.) We have reviewed the allegations of the complaint and Vasek's sparse submission in opposition to summary judgment and we find nothing to support Vasek's theory of conspiracy liability against Lapp.

We also disregard Vasek's first effort on appeal to assert a motion to tax Lapp's costs because Vasek never filed a motion to tax Lapp's costs in the trial court.

10. *Sanctions*

The trial court imposed sanctions of $1,400 on Vasek for filing the EAC in violation of the court's order allowing him to amend as to Grosz and Hartley only. Vasek has offered no credible argument and no authority as to why sanctions were an abuse of discretion under Code of Civil Procedure section 128.5: "Every trial court may order a party . . . to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous. . . ." We hold the trial court acted properly. Vasek's filing of the EAC was a blatant example of an action that was in bad faith, frivolous, or both.

11. *Disposition*

As Charles Dickens wrote in *Bleak House* about another interminable piece of litigation, it "still drags its dreary length

before the Court, perennially hopeless." While at one point in these proceedings we recognized Vasek may have been able to present a legitimate claim for trial, subsequent actions by him have lost him the right to proceed. We affirm the judgment in favor of defendants and order them, as prevailing parties, to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/ Gaut
J.

We concur:

s/ Ramirez
P.J.

s/ Hollenhorst
J.